

ORIGINAL

FILED

August 9 2010

IN THE SUPREME COURT
OF THE STATE OF MONTANA

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

No. DA 09-0624

WILLIAM RONALD HENDERSON,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

FILED

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Ed Smith
CLERK OF THE SUPREME COURT
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MOTION FOR EXTENSION OF TIME UNDER PROVISIONS OF RULE 26(1)
WITHIN WHICH TO FILE A RESPONSE TO ATTORNEY MERCER'S
ANDERS BRIEF AND MOTION TO WITHDRAW AS COUNSEL OF RECORD

CERTIFICATE OF MAILING

I, Ronald Henderson, do hereby swear, being aware of penalties for perjury, that I have placed in the prison United States Mail, a copy of my above captioned pleading, with postage thereon, which constitutes a filing with the Clerk of Montana Supreme Court, pursuant to Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988), addressed to the following: Clerk of Montana Supreme Court, 215 N. Sanders, Helena, Montana 59620; Steve Bullock, Montana Attorney General, Mark Mattioli, Assistant Attorney General, 215 North Sanders, P.O. Box 201401, Helena, Montana 59620-1401; Ed Corrigan, Flathead County Attorney, 920 S. Main, P.O. Box 1516, Kalispell, Montana 59903-1516; and Joslyn Hunt, Chief Appellate Defender, Koan Mercer, Assistant Appellate Defender, 139 N. Last Chance Gulch, P.O. Box 200145, Helena, Montana 59620-0145.

Dated this 3rd day of August, 2010.

Respectfully submitted,

By: 

RONALD HENDERSON

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OF THE STATE OF MONTANA

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COMES NOW, Ronald Henderson, Petitioner and Appellant in this Motion for extension of time within which to file a response to Attorney Mercer's so-called "Anders Brief" and "Motion To Withdraw As Counsel Of Record," dated and file stamped 7/26/10, received by Mr. Henderson on 8/2/10 at Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Washington 98520.

BASIS

On December 9, 2009, this Supreme Court of Montana appointed the Montana Office of the Appellate Defender (OAD) to represent William Ronald Henderson in filing a request for an out-of-time appeal, without addressing the fact that Appointed Appellate Attorney Neier is, and has been since 2003, counsel of record, and remains so to date.

The Montana Office of Appellate Defender apparently has

instructed Attorney Mercer to fulfill said 12/9/09 Supreme Court mandate without filing for a substitution of counsel from Attorney Neier to Attorney Mercer; thereby raising questions as to whether or not Attorney Mercer has in fact and law, "lawful representative authority," cf., Moreau v. Klevenhagen, 508 U.S. 22, 113 S.Ct. 1905, 123 L.Ed.2d 584 (1993); of which creates grave potential for conflict of interest requiring a hearing, cf., Wheat v. United States, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988); all of which is complicated further by the additional structural and jurisdictional defect questions as to whether or not there has in fact and law been an appealable "final judgment" that would validify filing a request from an out-of-time appeal, as one cannot validly appeal from a judgment never made, see attached Appendix (A) entitled, "Montana Rules Regarding Appealability," most of which were implicitly and/or explicitly raised by the Montana Supreme Court in the 12/9/09 Order.

Attorney Koan Mercer has filed what appears to be a novel and potentially improper procedural Anders Brief, along with a "Motion To Withdraw As Counsel Of Record," stating in its entirety:

COMES NOW, Koan Mercer, counsel of record for Petitioner and Appellant, and respectfully requests an order from this Court allowing him to withdraw as counsel of record in the above entitled matter. Counsel has determined that an appeal would be frivolous or wholly without merit after reviewing the entire record and researching applicable statutes, case law, and rules. The Petitioner-Appellant has been advised of counsel's decision and of his right to file a response to this motion. Counsel will send the file and

transcripts in the matter to the Defendant-Appellant at his written request so that he can file an appropriate response to this motion.

A brief in support of this motion has been filed simultaneously with this motion.

Opposing counsel has been contacted regarding this motion and does not object.

Respectfully submitted this 26th day of July, 2010.

By: Koan Mercer

Petitioner-Appellant Henderson asserts that he is of the firm belief that Attorney Mercer is attempting to perpetrate a fraud on this Supreme Court by stating "counsel has determined that an appeal would be frivolous or wholly without merit after reviewing the entire record and researching applicable statutes, case law, and rules," and urges this Supreme Court to consider imposing Rule 11 or other appropriate sanctions upon Attorney Mercer.

Petitioner-Appellant Henderson further asserts that in a true Anders proceeding the reviewing court is required to have the entire record before it, therefore, since Attorney Mercer claims he has reviewed "the entire record," he will be submitting the entire record to this Supreme Court for his so-called "Anders Brief," determination by this Montana Supreme Court.

Petitioner-Appellant Henderson also asserts that he will need a copy of "the entire record ... so that he [Henderson] can file an appropriate response to this motion," thereby an extension of time within which to file said response is essential so that Petitioner-Appellant Henderson can receive and review "the entire record" that Attorney Mercer promises this Supreme Court he will send to Henderson upon his

written request for "the entire file" a copy of which is attached hereto as Appendix (B). See also, Mont. Code Ann. § 46-8-103 Duration Of Assignment:

(1) When counsel has been assigned, the assignment is effective until final judgment, including any proceeding upon direct appeal to the Montana supreme court, unless relieved by order of the court that assigned counsel or that has jurisdiction over the case.

(2) If counsel determines that an appeal would be frivolous or wholly without merit, counsel shall file a motion with the court requesting permission to withdraw. The motion must attest that counsel has concluded that an appeal would be frivolous or wholly without merit after reviewing the entire record and researching applicable statutes, case law, and rules and that the defendant has been advised of counsel's decision and of the defendant's right to file a response. The motion to withdraw must be accompanied by a memorandum discussing any issues that arguably support an appeal. The memorandum must include a summary of the procedural history of the case and any jurisdictional problems with the appeal, together with appropriate citations to the record and to the pertinent statutes, case law, and procedural rules bearing upon each issue discussed in the memorandum. Upon filing the motion and memorandum with the court, counsel's certificate of mailing must certify that copies of each filing were mailed to the local county attorney, the attorney general's office, and the defendant. The defendant is entitled to file a response with the court.

As clearly dictated by § 46-8-103(1), appointed appellate Attorney Neier was assigned and remains assigned to this appeal until final judgment, which has not yet occurred because as clearly evidenced by attached Appendix (A), there has been no appealable "final judgment" during the State appellate process; and the fact that Attorney Neier has never been granted leave to withdraw as counsel, inherently negates any no-merit or frivolous finding.

In addition, the Supreme Court has concluded in its 12/9/09 decision that the no-merit hybrid to postconviction proceedings initiated by Attorney Neier was not timely filed; which Attorney Mercer fraudulently attempts to ignore by claiming a ninety day additional time to appeal to the United States Supreme Court, knowing that the Montana Supreme Court's dismissal of appeal as of right was not an appealable exercise of jurisdiction.

Opposing counsel is being contacted by the serving of this pleading upon opposing counsel to facilitate any objections thereto.

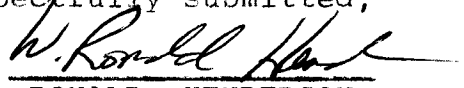
RELIEF SOUGHT

Petitioner-Appellant Henderson prays this Supreme Court will grant him an extension of time within which to file a response to Attorney Mercer's Anders Brief and Motion to Withdraw as Counsel of Record, to thirty days after Mr. Henderson receives a copy of "the entire file" from Attorney Mercer, as promised in his "Motion To Withdraw As Counsel Of Record.

Dated this 3rd day of August, 2010.

Respectfully submitted,

By:


RONALD HENDERSON